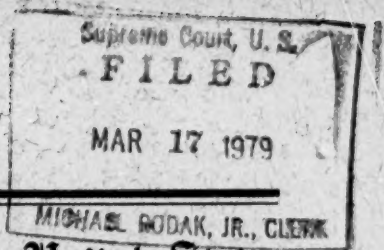


No. 78-1167



In the Supreme Court of the United States

OCTOBER TERM, 1978

CASPER CARROLL GIBSON, PETITIONER

v.

**REX DAVIS, DIRECTOR, BUREAU OF ALCOHOL,
TOBACCO AND FIREARMS, ET AL.**

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT**

**MEMORANDUM FOR THE RESPONDENTS
IN OPPOSITION**

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Solicitor General
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Washington, D.C. 20530

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Petitioner seeks review of the court of appeals' decision reversing the district court's order awarding him attorneys' fees. The district court's decision rested on a finding that respondents acted vexatiously and in bad faith.¹

1. In 1974 petitioner, an agent of the Bureau of Alcohol, Tobacco and Firearms (the Bureau), became engaged in an altercation with a fellow agent (Pet. App. 1a-2a, 30a). Petitioner was wounded and the other agent was killed (Pet. App. 2a, 30a-31a). While petitioner was on disability leave following the injuries he suffered in

¹The court of appeals did not reach the government's contention that the district court's finding of bad faith was clearly erroneous, and that factual issue remains unresolved. We will not repeat the argument on that question here, but we have lodged with the Clerk of the Court a copy of the government's brief on appeal, which thoroughly addresses this point.

that incident, he was discharged by the Bureau for his allegedly improper conduct during the incident (Pet. 9; Pet. App. 2a, 31a). On July 31, 1975, the Federal Employee Appeals Authority of the Civil Service Commission (FEAA) concluded that petitioner must be reinstated because the notice of proposed removal had been insufficiently specific and had not included one of the reasons cited in the final Bureau decision ordering that petitioner be discharged (App. 18-24).²

Respondents filed affidavits in the district court (App. 52, 57-58) stating that officials of the Bureau then met with petitioner and informed him that he would be reinstated, although proceedings to discharge him would be renewed. The affidavits stated that the officials also pointed out that it might be to petitioner's advantage to remain on disability status, because his worker's compensation payments, unlike regular pay, would not be cut off pending administrative appeal of a discharge (App. 53, 58). Petitioner was reinstated on September 3, 1975 (App. 27), although he elected to remain on disability status, and the Bureau discharged him a second time in a final decision dated October 8, 1975 (App. 30-32).

In December 1975, while petitioner's second FEAA hearing was pending, he filed suit seeking reinstatement and back pay (see Pet. 10). Since the FEAA proceeding was going forward, no action was taken by the district court. In an opinion dated February 5, 1976, the FEAA reversed the Bureau's second order discharging petitioner, this time on the merits, and it again ordered petitioner's reinstatement (App. 28-36). On March 8, 1976, petitioner returned to work (Pet. App. 15a; App. 37, 55, 58, 63). A pay adjustment was necessary because petitioner elected to claim back pay for the period of his second discharge in lieu of the disability

²"App." refers to the Defendants' Appendix filed in the court of appeals.

payments he had received, and in October 1976 petitioner received a check for \$738.50 to cover this amount (Pet. App. 15a). On October 26, 1976, petitioner retired on disability status because of emotional problems related to the shooting incident (App. 73-75).

Despite the fact that petitioner had been reinstated and subsequently retired on disability status, the district court held on November 5, 1976, that the Bureau had defied the FEAA by twice refusing to restore petitioner to its rolls (Pet. App. 1a-9a). The court ordered that petitioner be reinstated with back pay and ordered the Bureau to show cause why attorneys' fees should not be awarded to petitioner because of the government's bad faith behavior in failing to comply with the FEAA's orders.³ After a hearing at which evidence was received concerning petitioner's claim that he had been harassed after his return to work, the district court ordered that respondents pay petitioner \$5,000 in attorneys' fees (Pet. App. 10a-22a).

The court of appeals reversed (Pet. App. 30a-38a; 587 F. 2d 280), holding that whether or not bad faith is involved, 28 U.S.C. 2412 forbids the award of attorneys' fees against the United States in the absence of an express statutory authorization.⁴ The court concluded that, because no such

³Petitioner also sought disclosure of certain documents of the Postal Service concerning his case. The district court denied disclosure (Pet. App. 5a-8a), but the court of appeals remanded because of an intervening change in the law (Pet. App. 34a-38a). This matter is not at issue in the present petition.

⁴28 U.S.C. 2412 provides in relevant part:

Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action.

statute had been cited, and none could be located, the district court had erred in awarding petitioner attorneys' fees (Pet. App. 34a).⁵

2. The court of appeals' decision is correct, and it is in accord with a long line of cases holding that 28 U.S.C. 2412 forbids the award of attorneys' fees against the United States or its agencies and officers, unless a statute expressly authorizes award of attorneys' fees. See, e.g., *Rhode Island Committee on Energy v. GSA*, 561 F. 2d 397, 405 (1st Cir. 1977); *Fitzgerald v. CSC*, 554 F. 2d 1186 (D.C. Cir. 1977); *Natural Resources Defense Council, Inc. v. EPA*, 539 F. 2d 1068 (5th Cir. 1976); *Adams v. Carlson*, 521 F. 2d 168, 170-172 (7th Cir. 1975). Although the "American rule" against awarding attorneys' fees to the prevailing party does not apply in cases between non-federal parties when the losing party has acted in bad faith, see *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 257-260 (1975), there can be no non-statutory exception—for bad faith or any other grounds—to the rule established by Section 2412 when the United States is a party.⁶

⁵The court of appeals remanded for calculation of the amount of back pay that might still be owed to petitioner (Pet. App. 32a). Petitioner does not here challenge that portion of the court of appeals' decision.

⁶The cases petitioner cites (Pet. 37-40) are inapposite. *Tenants and Owners In Opposition To Redevelopment v. HUD*, 406 F. Supp. 960 (N.D. Cal. 1975), appears to have involved only a motion for attorneys' fees against a non-federal co-defendant. See *id.* at 963. In any event no attorneys' fees were awarded, and the court did not mention Section 2412. In *Red School House, Inc. v. OEO*, 386 F. Supp. 1177 (D. Minn. 1974) (which was decided prior to *Alyeska*), the district court awarded attorneys' fees based in part on the "private attorney general" theory and in part on the conclusion that moneys in OEO's appropriations for attorneys' fees could be used for this purpose, and thus no funds would have to be paid out of the Treasury. In *Adams v. Carlson*, *supra*, the plaintiffs sought to strengthen their claim for attorneys' fees under the private attorney general rationale by alleging that the government officials had acted in bad faith. The court concluded that in light of the decision in *Alyeska* their claim could not be sustained and also noted that the record did not support the claim of bad faith. 521 F. 2d at 170.

Section 2412 is a specific expression of the settled rule that an order that would expend itself on the Treasury is permissible only if Congress has authorized such relief. See *United States v. Testan*, 424 U.S. 392, 399 (1976); *United States v. Sherwood*, 312 U.S. 584 (1941). Petitioner has not identified any such authorization (and we know of none) for the payment of attorneys' fees in cases involving bad faith conduct by governmental agencies. The court of appeals therefore correctly reversed the district court's award of attorneys' fees.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MARCH 1979